(3)

No. 08-1242

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD, et al.,

Petitioners,

v.

JESSE BOND,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

JESSE BOND'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEIGH SKIPPER
CHIEF FEDERAL DEFENDER
MICHAEL WISEMAN
STUART LEV
ASSISTANT FEDERAL DEFENDERS
Federal Community Defender Office for the Eastern District of Pennsylvania
Suite 545- West, The Curtis Center
Philadelphia, PA 19106
215-928-0520

Counsel for Respondent, Jesse Bond

Dated: Philadelphia, PA
July 7, 2009

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals for the Third Circuit properly apply this Court's precedents in holding that capital trial counsel ineffectively failed to investigate or present compelling and available mitigating evidence of Mr. Bond's nightmarish childhood and resulting mental health impairments?

2. Did the Court of Appeals correctly conclude that the state courts' factual findings to the contrary were objectively unreasonable because they were not supported by the record?

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COUNTER STATEMENT OF THE CASE[1]

A Panel of the United States Court of Appeals for the Third Circuit denied habeas corpus relief to Mr. Bond on his guilt phase claims, but affirmed the district court's grant of penalty relief. The facts before the Panel showed this was really not a close question. Trial counsel literally did no investigation of Mr. Bond's social history prior to the jury's return of the guilty verdict. He failed to secure a single record or document regarding Mr. Bond. He arranged a brief mental health evaluation for his client, but failed to provide the evaluator with any information about Mr. Bond, other than routine police paperwork, and then, when the evaluator determined that there were areas requiring followup, counsel failed to conduct it. Then, on the eve of the penalty phase (which began and ended in a single day), trial counsel abandoned his client at the last minute and permitted an unprepared and inexperienced second chair attorney to take over the entire penalty phase.

The Commonwealth's *Petition* fails to mention, acknowledge or apply this Court's precedents regarding the obligations of counsel in a capital penalty phase. See Williams v. Taylor, 529 U.S. 362, 393 (2000); Wiggins v. Smith, 539 U.S. 510, 532 (2003); Rompilla v. Beard, 545 U.S. 374 (2005). The Commonwealth does not complain that the Panel misapplied these precedents

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[1]The Petition for Writ of Certiorari is cited herein as "*Petition*." Petitioners, the prison officials who have custody of Mr. Bond, and who are represented by the local prosecutors, are referred to as "the Commonwealth." Respondent, Jesse Bond, was the habeas petitioner below and is referred to herein as "Mr. Bond." The parties filed an appendix in the Third Circuit, pursuant to that court's rules, which is cited herein as "A." The decision of the Court of Appeals for the Third Circuit (Bond v. Beard, 539 F.3d 256 (2008) will be cited as Bond followed by a page reference. The Pennsylvania Supreme Court's decision affirming Mr. Bond's judgment of conviction on direct appeal (Commonwealth v. Bond, 652 A.3d 308 (Pa. 1995)) will be cited as Bond-1, followed by a page reference. The Pennsylvania Supreme Court's opinion affirming the denial of state post-conviction relief (Commonwealth v. Bond, 819 A.2d 33, 45 (Pa. 2002)) will be cited as Bond-2, also followed by a page reference.

All emphasis herein is supplied unless otherwise indicated.

or any other. Instead, the Commonwealth manufactures a complaint that the factual findings of the state court were not accorded appropriate deference. The actual facts show the Commonwealth's complaint is illusory. Trial counsel's performance was far below what this Court expects of capital counsel. The Panel correctly applied this Court's precedents and afforded the state court decisions all appropriate deference required by AEDPA's section 2254 (d) (1) and (2).

A. Failure to Investigate.

Trial counsel, James Bruno, was assigned by the state trial court to represent Mr. Bond on three criminal cases: a robbery/assault (date of incident October 16, 1991); another homicide (date of incident October 21, 1991) (hereafter, "first homicide") and the instant case (date of incident October 31, 1991) (hereafter, "second homicide"). A - 1573-74, 1604-05. The first homicide trial concluded in December, 1992 with a verdict of second degree murder, and therefore no penalty phase was conducted. A - 1579-80.

Bruno testified in state post-conviction that his mitigation theory with regard to the first homicide was focused on the fact that at the time of that trial Mr. Bond had no prior criminal convictions. He focused on that fact and other "things that Jesse had done where he would help people . . . good things he had done" A - 1582, and limited his investigation accordingly.

Although Bruno maintained sporadic contact with Bond's family, he admitted in post-conviction proceedings that up until the time of the December 1992 verdict in the first homicide, he had never discussed mitigating evidence with Bond's family. His conversations with the family up to that point were only to update them on the progress of the cases. A - 1577-78. His first and only mitigation-related discussion occurred when a group of Mr. Bond's family waited in his office for the verdict in the first homicide. On that occasion he spoke with them as a group for only 15

minutes, A - 1580, and the discussion related only to anecdotes about good deeds that Mr. Bond had done.

Dean Owens was an attorney employed by the public defender, which had recently created a homicide unit. In order to qualify to handle homicide cases, Owens had to obtain certification under local court rule, which required him to gain capital trial experience. Prior to the start of trial Owens asked Bruno if he could second chair the Bond trial to gain some of the requisite experience. With Bruno's consent Owens entered his appearance on January 22, 1993 (A - 1586, 1850), one week before the start of jury selection in the second homicide on February 1, 1993, and only two weeks before the start of the penalty phase on February 9, 1993.

Bruno admitted that neither he nor Owens conducted any mitigation-related interviews with the family in the time between the first and second homicide cases. After the first group discussion took place in his office (while the family was waiting for the verdict in the first homicide), the next discussion took place after the first degree verdict was returned in the second homicide. A - 1581-83.

Owens concurred that between the time of his entry into the case and the return of the first-degree verdict, penalty preparation was limited to "general discussions" with Bruno. A - 1850. He stated that "penalty phase preparation . . . did not begin in earnest until after a first degree verdict . . . was obtained." A - 1851. Owens also admitted that, prior to the guilt verdict, neither he nor Bruno conducted any investigation into Mr. Bond's background or social history.

When the first-degree murder verdict was delivered, both attorneys and Mr. Bond were "very upset." Bruno in particular was "shocked by the verdict" because he "did not expect a first degree verdict." He was "tired" and "exhausted." A - 1855-56. The lawyers spoke to the family "briefly"

in the courtroom and to their client. Id. The lawyers then sent some family members over to their office, and "basically spent the evening calling up people telling them what had happened, telling them to come, that Jesse was going to have a penalty phase the next day." A - 1856-57, 1583. Counsel began to interview potential mitigation witnesses to "gather out anecdotal stories about Jesse that . . . would be good to bring up." A - 1858. It was the first time that Owens had spoken to many of the potential witnesses. See e.g. A - 1860 ("But, Judge, to answer your question relating to alcoholism, you know, when you're meeting somebody for the **first time** or speaking to them over the phone **for the first time** . . ." (A - 1861)). Owens admitted that the lawyers were not asking the potential witnesses about family alcoholism, childhood abuse, truancy, school difficulties or about the family generally. A - 1862-63.

Neither Owens nor Bruno conducted a thorough investigation – or much of an investigation at all – of what lay witnesses could say about Mr. Bond's background. A - 1577-1585 (Bruno: his limited penalty phase discussions with Mr. Bond's family did not address abuse, poverty, family dysfunction, school performance, etc.); A -1630 (Bruno: **"It's not as if I had asked them about it [Mr. Bond's background] though. I never really sat down and said, 'Tell me about his background.'"**); A - 1923-1926 (Owens: he had only taken **incomplete** histories from the family during the evening and night before the penalty hearing, and that he did not investigate abuse, neglect, early childhood development, school records, head injuries, or impulse control problems); A - 1870-71 (Owens: acknowledging that counsel had not prepared Mr. Bond's "social history").

Bruno and Owens admitted that they did not secure Mr. Bond's school records for use at

trial.[2] (Bruno, A - 1597; Owens, A - 1853).

Bruno retained Allan M. Tepper, Ph.D. to perform a psychological evaluation prior to the start of the first homicide trial. Tepper was primarily asked to assess whether Mr. Bond was mentally competent to understand and waive his Miranda rights. A -1671. Tepper was advised at some point that the cases might be "designated as a possible death penalty matter, and that mitigation may be a question." A - 1671-72. Tepper requested that counsel provide him with all available background materials. However, the only materials he received was the discovery provided to counsel by the prosecutor and he was not provided with Mr. Bond's school records. A - 1673, 1590-91, 1597.

Tepper conducted a 90 minute evaluation of Mr. Bond. He performed a clinical interview and administered limited "screening" psychological tests. He also conducted a "brief" telephone call with Mr. Bond's mother, who "was not terribly articulate." (A - 1678) He learned that Mr. Bond repeated third grade and dropped out high school (A - 1675-76). These facts "raise[d] a number of questions" which could be answered by determining if "they'd be [sic] past attendance or testing or behavioral reports to try to get a better idea very simply of what was going on when Mr. Bond was a younger person." A - 1676.

Even with his limited information and brief evaluation, he believed that Bond suffered "family difficulties and/or school problems," A - 1680, which required further exploration. Tepper explained: "I didn't just have a hunch. I had reported information that I thought was accurate that suggested past family difficulties **but I had no other records or interviews**."

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[2]Mr. Bond's school records were admitted in the state post-conviction hearing and are in the Third Circuit Appendix. A - 2348-2472

Tepper's report to Bruno noted a number of areas requiring followup. In particular, he noted that Mr. Bond had a "flat affect"; that he repeated third grade although he had low average intelligence; that he sustained a head injury after being struck by a car jack and has since experienced difficulties with sleep and dizziness; testing indicated deficiency in problem solving skills; impulsively; he lacked ability to plan or think ahead or devise a "more step by step means to reaching desired goals." See Tepper Report, December 2, 1992, A -2473-2475.

Bruno did not speak with Tepper subsequent to receiving the report. A - 1591. He acknowledged that he did not ask Tepper at any time about the tests he administered or the results (A -1591-92); he provided Tepper with no guidance or suggestions about areas to explore (A - 1592) ("I figured he was the expert, he would know what was needed"); he did not question Tepper about the family (A - 1593) or about the apparent anomaly that Mr. Bond repeated third grade despite having low average intelligence (A - 1593-94); and he did not discuss Tepper's additional test findings that Mr. Bond had difficulty with abstract reasoning, problem solving, and impulse control (A - 1595-96). Tepper was presented with the school records in post-conviction proceedings. He thought the school records were important:

> From early on, Mr. Bond was showing lower abilities or lower academic levels since early on in school which would raise a question as to whether he had just low innate abilities or there might be some other kind of basis for that. There were difficulties over the years with attendance. There were attempts by the school system to make contact with his mother, and there's some notations as to times, they were unable to contact her . . . the school attempting to reinforce the need for him to attend school on a more regular basis, and in my opinion Mrs. Bond's either inability or unwillingness . . . on not following through, on not being able to get him there on a regular basis.

A - 1688-89.

Tepper's evaluation and the school records (which he saw only after trial), raised a number

of questions that required followup. The school records raised in Tepper's mind a "strong question as to what was going on in the family home . . . or [would lead] to further investigation." Id. See also A - 1690 (records raised questions about upbringing, particularly his "chronic absenteeism" as a child); A - 1743 (indicating that "more extensive background and interviews" were required); A - 1746 (same). Trial counsel, who never obtained the school records, and failed to compile a family or social history, never conducted any such followup.

B. The Sudden Switch in Counsel.

As late as the night before the penalty hearing, Bruno (who was lead counsel and responsible for decision-making (A - 1587), was to present the penalty phase evidence and argument. Owens' role was that of "helper and adviser" A - 1865-66. With only hours before the commencement of the penalty hearing, the attorneys' roles suddenly began to change. Because of Owens' father's "long career as a correctional . . . administrator" the attorneys decided that they would attempt a "dual closing" in which Owens would talk about "prison life" while Bruno would "talk about aggravation and mitigation and the legal technical side." A - 1866-67.

The next morning, counsel moved to permit the "dual closing" however, the Commonwealth objected and the trial court denied the request. A - 1104-1109, A -1868. Bruno asked for a recess to permit counsel to discuss the court's ruling A - 1109 – the court adjourned for five minutes. A - 1115.

Incredibly, during this five minute recess, the lawyers decided that Owens would do the entire penalty phase argument (A - 1868-69). Up to that point, Owens had only written notes about his part of the closing argument related to prison life and mercy (A - 1869). Even more incredibly, once the decision was made that Owens would present the full argument, a second decision was made that

he would also present the opening statement and evidence. A - 1869-70. Owens testified:

> [S]o what I did in the time that was afforded me is I quickly got together what I wanted to say in an opening and I quickly basically with . . .Bruno helping me, outlined, you know, who I was going to call, what we were going to ask them and these kinds of things. And so that's what happened. . . [T]his all happened within, I would say, no more than 15 minutes.

A - 1870. Although Owens felt that he was not properly prepared for these tasks, he decided that it would be better for him to do it, because Bruno "look[ed] to me as if someone had kicked him, he had been kicked by a mule" (A - 1871-72).

Trial counsels' failure to prepare and the havoc caused by their last minute shift in role, caused Mr. Bond demonstrable harm. Despite the presence of a rich mitigation history, not one juror found even one mitigating circumstance. Bond-1, 310. The harm caused by counsels' failure to investigate and prepare for capital sentencing can be seen by comparing what was presented at trial with the mitigating evidence that counsel failed to investigate or present.

C. **The Evidence Presented By Trial Counsel.**

The evidentiary portion of Mr. Bond's penalty phase encompassed a mere 41 transcript pages. A - 1128-1169. Counsel called seven witnesses who provided only the most superficial view of Mr. Bond's life and upbringing. Counsel presented no documents or records regarding Mr. Bond's life or upbringing. Nothing was presented about Mr. Bond's horrific and dysfunctional family history.

Mr. Bond's mother **(Queenie Victoria Bond Conner)** provided basic pedigree information (A - 1129). She told the jury that Mr. Bond "liked to just do things . . . talking and joking." She related some minor good deeds he performed (A - 1129-31, 1133-34) (picked his mother up at work; cared for her when she was ill; ran errands). He dropped out of high school because he was getting

"beat up all the time." He tried to get his G.E.D., but failed by a point and therefore could not fulfill his desire to join the armed services (A - 1131). He was employed intermittently at menial jobs (A - 1131-33). Mr. Bond had no involvements with the law prior to October 1991 (A -1134). Mr. Bond had a positive relationship with Mr. Conner, whom his mother married when Mr. Bond was about 17 years old, but who died in May 1990 (A - 1134-35). When Connor died, Mr. Bond did not want to discuss him (id.). When Mr. Bond "got out of line" he would be disciplined by her, or by one of Mr. Bond's older siblings (A - 1136, 1139). Three of her sons went into the military (id.). Jesse loved his children, was concerned about the abusive atmosphere in his children's home, and he talked with her about helping them (A - 1137-38).

Terry Bond (Mr. Bond's older brother) testified that Mr. Bond "got jumped" by gangs and stopped going to school (A - 1143-45). He stated that their brother, Robert Bond, provided discipline to Mr. Bond when his mother was not home (A -1146). He encouraged Mr. Bond to join the Army as a "way to escape the drug wars" (A - 1147). He stated that Mr. Bond baby sat his children: "He comes by. He would take them out." (A - 1148).

In her four pages of testimony (A - 1150-1154) **Barbara Epperson** (a family friend) described Mr. Bond as a "little joker" as a child: he "liked fun . . . to play jokes." He was respectful to his elders, but did not have many friends. He liked to help people, and he baby sat for her. She described Mr. Bond's relationship with Connor: "they were buddies"(A - 1152). Mr. Bond's mother told her that Mr. Bond was trying to get his children from their mother because of the negative environment in the mother's home (A - 1153).

In her two pages of testimony, **Patricia Bond-Jenkins** (Mr. Bond's sister), told the jury that Mr. Bond is "caring [and] loving" and she asked the jury to spare her brother (A - 1156-57).

Annette Woods' daughter was married to Mr. Bond's brother (A - 1160). She testified for three pages that Mr. Bond was a "very sweet, lovable young guy" who was helpful and respectful to her and other elders (A - 1160-61). She asked the jury to spare Mr. Bond's life (A - 1162).

Tony Bond (Mr. Bond's brother) testified for two pages (A - 1163-65). He was in the army, and he encouraged Mr. Bond to join, even after failing the G.E.D. Mr. Bond was close to Connor and when he passed away, Mr. Bond was "hurting." He asked the jury to spare Mr. Bond (id.).

The last witness was Mr. Bond's cousin, **Sharon Ryan** (A - 1165). Mr. Bond moved in with her and her two young daughters in mid-September 1991. Her daughters loved Mr. Bond and he loved them and he helped with the children (A -1166-68). She described Mr. Bond as "fun-loving" (he "loved to joke"). She asked the jury to spare him (A - 1169).

The jury found no mitigating factors. Bond-1, 310.[3]

D. The Evidence Trial Counsel Failed to Investigate, Develop and Present.

Counsel failed to investigate or present available evidence regarding Mr. Bond's abusive, neglectful and dysfunctional upbringing. The following evidence was presented in state post-conviction proceedings.

1. School Records.

Mr. Bond's school records demonstrate that he was raised in a highly dysfunctional and poverty stricken family. When Bond was seven years old his first grade teacher made the following notation in his record: "1/4/74 Child seems sleepy when he does come to school and is often

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[3]The Commonwealth misrepresents to this Court when it writes "the jury decided that, after two murders, the **balance** weighed in favor of death" *Petition*, 5. The Commonwealth knows that under Pennsylvania's sentencing scheme, a jury only "balances" when it finds mitigating factors. When, as here, it finds no mitigating factors, Pennsylvania requires imposition of a mandatory death sentence. Blystone v. Pennsylvania, 494 U.S. 299 (1990).

unkempt." A - 2375. Three years later, at age 10, when Mr. Bond was repeating third grade, a school counselor visited his home to investigate his extensive absences. The counselor wrote the following note:

> 1/17/77 Home visit. Spoke with mother who said absences from 12/17 to 1/9 because **Jesse had no coat**. . . Fully discussed the unexcused aspect of the absences for no coat. **Reminded mother of parental responsibility** for her child's welfare **which includes sending him to school regularly.**

A - 2366. This was not an isolated incident – Mr. Bond's mother was lax when it came to "parental responsibility." As a child, Bond frequently did not attend school, for a variety of reasons that included lack of shoes and clothing, and lack of hot water and heat in his home. He also did not attend school because his mother sent him to work at age 10. In fourth grade (age 10) a school counselor again visited his home to investigate his frequent absences. The counselor wrote:

> 2/7/77 Home visit. **Family has had no heat and hot water since 1-21-77.** Advised mother to contact L&I for assistance. Suggested to mother perhaps family or friends could help. Mrs. Bond stated that people were not friendly. **Jessie has been on the streets due to Mrs. Bond sending him out to work.**

A - 2359. Later that year, the counselor wrote:

> 3/24/77 Home visit. Spoke to mother who said Jesse was absent March 10, 11 & 12 because **Jesse had no shoes**. Reminded mother of her promise in the past that such conditions would not cause future absences.

A - 2366. In June, the family simply disappeared:

> 6/15/77 Family moved suddenly because a sibling was involved in a serious community incident. This case will be followed closely in Sept.

A - 2366.

2. **Lay Witnesses.**

Had trial counsel obtained these records they would have been compelled to ask the family and friends about the information contained within them. Doing so would have allowed counsel to tap into the wretched conditions under which Mr. Bond was reared.[4]

Six witnesses testified in state post-conviction proceedings about Mr. Bond's childhood. Their testimony is summarized.[5]

Mr. Bond's early life was marked by **extreme poverty**: A - 1275, 1285, 1648-49 (lack of food; electric, water and heat turned off for non-payment; family "borrowed water" from neighbors, used space heaters), 1788 (children would drink lots of water and eat bread before bed to fend off hunger); 1956 (family lived on a welfare check of $51 every two weeks and sometimes the "food would give out," mother would replace baby formula with water drained from cooked oatmeal and mixed with Karo syrup); 1285 (children lacked necessary clothing).

Mr. Bond's early life was marked by his mother's **violence and vicious physical abuse**: A - 1282-83 (mother would physically fight with her many live-in boyfriends, which the children would witness); 1287 (mother would beat the children with "sticks and cords"); 1651 (mother would hit the children with "her hand, a shoe a book . . . it depended on what was near her") 1777 (mother

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[4]See Rompilla v. Beard, 545 U.S. 373, 391 (2005) ("The accumulated entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts. With this information, counsel would have become skeptical of the impression given by the five family members and would unquestionably have gone further to build a mitigation case.")

[5]Each of these witnesses verified counsels' testimony that counsel did not ask them about any aspect of Mr. Bond's dysfunctional and abusive upbringing. See A - 1308-09 (Tony Bond); A - 1660-61 (Barbara Epperson); A - 1800 (Carolyn Bond-Jenkins); A - 1835-36 (Terry Bond); A - 1966 (Queenie Conner).

threw a knife at Mr. Bond's 10 year old sister); 1827 (mother would beat the children's bare bottoms with a belt on regular basis); 1952-54 (mother admitting that she beat her children including Mr. Bond); 1652, 1778 (the abuse was unpredictable). During Mr. Bond's early childhood the family violence was exacerbated by a **series of live-in boyfriends**: A - 1781 (mother had relationships with men who were not "responsible"; "they had problems with alcohol as well;" they struck the mother in front of the children); 1281-83 (mother had "more than ten" men "around the house" who would physically fight with her in front of the children).

Mr. Bond's mother was a **severe alcoholic**. Her alcoholism worsened the family violence and dysfunction: A - 1286 (mother drank "constantly," whenever "she had the money"); 1286 (the drinking effected her behavior: she would "foam" at the mouth, become "angry and hyped, when she drank "little things" would cause her to "blow-up," with frequent arguments and fights); 1775 (mother's drinking "altered her way of disciplining us. She would be agitated [and], transferred that agitation" to the children. Her beatings were more frequent when intoxicated and more severe); 1651(drank gin daily – from a half pint to a half gallon).

Mr. Bond's mother was a **gambler** who spent the family's meager resources on her habit: A - 1780 (mother hosted all night card games with loud, drunk and argumentative players); 1294-96 (mother played cards and the "numbers"; there were all night card games in the home – they were loud, drunken and raucous events; "when she lost we went without"); 1657 (she would gamble away her last dollar).

Mr. Bond's mother admitted that she was not much of a parent. When her children told her that they were being threatened by gangs to join, she mused: "if you don't join the gang they are going to beat you up. If you join I am going to get to you." A - 1959. She described her interactions

with the school authorities:

> And the school got on me about him not coming, you know. But he wasn't. But they would get on me about the other children. So I went to the school. So they called the welfare peoples. And told them that I wasn't getting no support for my children. They have to have him back at school. But, I couldn't get him in school until the peoples, the school made the welfare send me money for the children for me to get hot water to clean them up, and stuff, and feed them so they could go to school.

A - 1956.

3. Mental Health Experts.

Mr. Bond called two mental health experts in post-conviction: Barry Crown, Ph.D. and Richard Dudley, M.D., in addition to Dr. Tepper. The Commonwealth called John Gordon, Ph.D. as its expert. Although there was disagreement between Mr. Bond's experts and Gordon regarding whether Mr. Bond suffered brain damage, each expert, including Gordon, agreed that the school records and Mr. Bond's history of abuse and dysfunction were important.

Crown noted that the school records:

> clearly indicate dysfunctional aspects in the home. And certainly from the school perspective, the child for reasons that were taking place at home was not in school. . . . [This is] important because it shows underlying family dynamic and relationship situations that interfere with the age appropriate major life's work of someone. And the major life work . . . at the time of being ten or 11 years old is going to school during the school year.

A - 1360. Crown also reviewed the accounts by family members (A - 2512-2527), which described "clinically significant" childhood abuse, family dysfunction and neglect (A - 1360-61).

Dudley also opined that Mr. Bond was subject to significant childhood abuse, and physical and emotional neglect as evidenced by the school records (A - 2018-20) and family accounts (A - 2038) (family "lend further support to the reports of very serious neglect and abuse . . . that the environment was one of alcoholism and other violence").

Based upon review of the records, family accounts and clinical interviews of Mr. Bond, Dudley concluded that Mr. Bond suffered from Post-Traumatic Stress Disorder (PTSD) (A - 2049).[6] The trauma underlying this condition was the childhood abuse and violence suffered by Mr. Bond (A - 2052). The childhood trauma and resulting PTSD were exacerbated by an incident in his adult life when he was confronted by a new trauma, which Dudley believed was "reminiscent" of his childhood abuse and trauma. (A - 2050-53) (Dudley indicating the correlation between childhood and adult trauma and resulting impairment of Bond's function).

Dudley considered the behavioral impact of the childhood trauma suffered by Mr. Bond and the PTSD caused by it, as well as the adult trauma and stressors extant in his life at the time of the offense to each constitute an extreme mental disturbance which substantially impaired Mr. Bond's ability to conform his conduct to the requirements of law. A - 2053-59. See Pa.C.S. 9711 (e)(2) & (3) (extreme mental or emotional disturbance and a substantially impaired capacity to appreciate the criminality of conduct and to conform to the requirements of the law, are each mitigating factors in Pennsylvania).

The Commonwealth's expert, Dr. Gordon, agreed that Mr. Bond's school records

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[6]Dudley provided the following working-definition of PTSD:

> [It] is a disorder that develops in response to a traumatic event, one that's life threatening or perceived by the individual to be either life threatening or threat of serious harm in some sort of way.
>
> The symptoms that are developed in response to this traumatic event fall into three general categories. The first . . . is that the person in some way continues to re-experience the traumatic event; second, there are behaviors that are indicative of avoidance of things that might remind one of this traumatic event . . . and third, there are symptoms of increased arousal.

A - 2049-50.

demonstrated that "something is wrong" within the family that should have been investigated. A-2326, 2329-30 (family dysfunction and abuse may explain poor attendance and school performance); 2331 (records "raise[] a question about dysfunctional family"). Gordon disputed only Crown's finding of organic brain damage. He did not dispute or otherwise comment on Crown and Dudley's findings that Mr. Bond was subject to significant childhood abuse and neglect, or Dudley's diagnosis of PTSD – those findings all went unchallenged.[7]

REASONS FOR DENYING THE WRIT

I. The Commonwealth at Most Seeks Error Correction.

A writ of certiorari is "granted only for compelling reasons." Supreme Court Rule 10. This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). This Court does not grant the writ simply to correct purported error by a lower court. See Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) ("certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 190-91 (6th ed. 1985) (same).

In this case, the Commonwealth's *Petition* amounts to nothing more than a request for error correction. The Commonwealth has identified no overarching principal of law or disagreement amongst the courts of appeals, that would merit this Court's intervention. Rather, the Commonwealth simply invents an alleged improper application of AEDPA, which is not a proper basis for invoking this Court's certiorari jurisdiction. Moreover, as set forth in the remainder of this

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[7]As outlined above, Tepper also believed that the school records were significant and required further investigation.

Brief, there are no errors to correct. The Third Circuit Panel properly recognized and applied the appropriate standards of deference to the state court decisions.

That the Commonwealth seeks mere error correction is evident from the relief it requests. The Commonwealth does not request that this Court take and review the case in order to clarify an unsettled or important question of law. To the contrary, the Commonwealth requests that the judgment of the Court of Appeals be "summarily reversed" or "remanded for reconsideration in light of Knowles v. Mirzayance," *Petition*, iii, 7, 20. This is error correction, plain and simple.

II. The Court of Appeals Did not Misrepresent the Deference it Paid to the State Court.

The Commonwealth acknowledges that the Court of Appeals said it was paying deference to the decisions of the state courts but, according to the Commonwealth, it did not really mean what it said: "The opinion below is full of the *language* of deference. It simply lacks any *actual* deference." *Petition*, 9 (emphasis in original). The Commonwealth claims that the Panel decision is yet another example of how federal courts "may be reluctant to accept [AEDPA's] limitation on their habeas review powers." Id.

The Commonwealth's *Petition* is thus based on little more than an allegation that the Third Circuit Panel misrepresented its statements that it was affording AEDPA deference to the state court decisions and findings. This allegation is unworthy of certiorari review and is belied by the record.

The notion that the Court of Appeals did not do what it said, or fails to appreciate the limits placed on it by AEDPA review, is thoroughly refuted by the Panel's treatment of another claim raised by Mr. Bond. Mr. Bond also raised a jury selection claim under Batson v. Kentucky, 476 U.S. 79 (1986). The Panel's treatment of that claim puts to rest any suggestion that it failed to understand or "accept" AEDPA's limits on its habeas powers.

With regard to the Batson claim, the Panel noted that Mr. Bond argued that *de novo* review and not AEDPA deference was appropriate because the state courts did not apply the full and proper Batson three step inquiry. The Panel observed that "the record certainly gives serious cause for concern that the state courts did not reach the third step of the Batson analysis," Bond, at 268. Nonetheless, after a thorough, detailed and exhaustive review of the state court proceedings, id., at 264-29, the Panel "conclude[d] that the trial court and the [Pennsylvania] Supreme Court both reached the third step of the Batson analysis . . . [and] therefore [we] apply the deferential AEDPA standard of review." Id. at 268-69. Thus, if the Panel was predisposed to seek to avoid AEDPA deference, or if it did not "accept" AEDPA limits on its habeas review powers, the Batson claim presented the perfect vehicle for the expression of these feelings. However, even though the "record certainly gives serious cause for concern" about whether AEDPA deference was appropriate, the Panel ruled against Mr. Bond on this point, and found that it was bound to apply AEDPA deference.

Having determined that the state courts applied the correct legal test to the Batson claim, the Panel then had to decide whether the state courts' decisions were unreasonable applications or were contrary to this Court precedents under 28 U.S.C. 21 2254(d)(1), or whether the state court fact findings were unreasonable in light of the record. Again, the Panel noted that there was a "legitimate concern" that the trial prosecutor engaged in discriminatory strikes, and that "reasonable minds could differ on the proper result" Bond, at 272. However, whether there was "concern" or whether reasonable minds could differ "**[i]s not our inquiry**":

> As discussed, we apply the deferential AEDPA standard. **The possibility that we might have resolved this question differently had we sat as the trial court does not provide a basis for habeas relief under that standard**. The trial court record does not allow us to conclude that the state court decisions were either "contrary to," or involved an "unreasonable application" of, Supreme Court precedent, see28

> U.S.C. § 2254(d)(1), nor that the state courts' findings were unreasonable in light of the record before them, see id. § 2254(d)(2). **We thus defer to the state courts' conclusion that Bond failed to meet his burden at the third stage of the Batson analysis on the record before the state courts.**

Bond, at 272.

The Commonwealth's *Petition* fails to explain how the same Panel that deferred to the state courts, despite its own misgivings about the correctness of the decisions of those courts, failed to properly understand or "accept [AEDPA's] limitation on their habeas review powers." *Petition*, 9 when it came to the claim about which the Commonwealth now complains. There is no explanation from the Commonwealth, because its basic proposition that the Court of Appeals does not accept this limitation is illusory.[8]

III. The Commonwealth's Misunderstanding of Knowles v. Mirzayance.

The Commonwealth's reliance on Knowles v. Mirzayance, 129 S.Ct. 1411 (2009) is overblown and misguided. Mirzayance broke no new AEDPA ground – it simply applied established habeas principles. It repeated the same concepts applied by the Panel in the instant case: i.e., that state court decisions are not challengable simply because they were "incorrect" but only when they are objectively unreasonable. Mirzayance, 129 S.Ct. at 1420.

Perhaps the only "new" thing about Mirzayance was the use of the phrase "doubly deferential" to describe AEDPA review of a claim of ineffective assistance of counsel. Id. ("Under

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[8]The Panel also had to address whether a demonstrated Confrontation Clause error was harmless. Bond, 275-276. Here again, the Panel displayed a thorough understanding of AEDPA. It noted that the district court addressed this issue under AEPDA's 2254(d)(1) & (2). However, it applied the intervening decision in Fry v. Pliler, 551 U.S. 112 (2007), requiring that a habeas court apply the test under Brecht v. Abrahamson, 507 U.S. 619 (1993) to a harmless error question, and it did so. This is not a Court that does not understand or accept this Court's directions respecting AEDPA.

the doubly deferential judicial review that applies to a Strickland claim evaluated under the § 2254(d)(1) standard"). However, even the use of this phrase does not describe a new test or legal principle. It is only a short-hand description of the two hurdles that a habeas petitioner must overcome with respect to certain aspects of a Strickland claim that is reviewed under AEDPA's section 2254(d)(1).

When evaluating an ineffective-assistance-of-counsel claim, Strickland holds that deference is owed to the tactical decisions made by trial counsel after thorough investigation. Strickland v. Washington, 466 U.S. 668, 690-91 (1984). This constitutes the first level of Mirzayance's "double deference" – when a habeas petitioner challenges the alleged deficient performance of his prior counsel he must first overcome Strickland's deference to the tactical decisions made by trial counsel after proper investigation.[9] AEDPA's section 2254(d)(1) requires a second level of deference be paid to the state court decision that itself provides deference to the tactical decisions of counsel made after full investigation.

Thus, Mirzayance's "double deference" is just a short hand term to describe the long-standing two tests that must be overcome by a petitioner in order to prevail on a claim that counsel performed deficiently. "Double deference" has no application whatsoever to AEDPA review of Strickland **prejudice**, or AEDPA review of state court fact finding, and thus has no application to the issues presented by the Commonwealth, which **do not arise under 2254(d)(1), but rather under (d)(2)**. And, more to the point, as the next section shows, the Court of Appeals was absolutely correct in its (d)(2) holding.

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[9]Of course this deference is not appropriate here, as counsel failed to undertake a proper penalty phase investigation, and failed to follow up on even the minimal investigation he conducted.

Mirzayance is also inapplicable here because it arose from a factual scenario that had not been previously addressed by this Court – whether counsel was ineffective for deciding to withdraw an insanity defense when its underlying factual basis had already been rejected by the jury. The Court of Appeals for the Ninth Circuit thought counsel was ineffective because there was "nothing to lose" by continuing with the defense. Because there had been no prior treatment of this question, this Court acted. Mirzayance, 129 S.Ct. at 1419 ("With no Supreme Court precedent establishing a 'nothing to lose' standard for ineffective-assistance-of-counsel claims, habeas relief cannot be granted"). That was a case that required guidance from this Court. That is not the case here, where the Panel applied long-standing and settled law.

This case is vastly different from Mirzayance. Unlike the lawyers there, who fully investigated and were prepared to present an insanity defense, Mr. Bond's trial counsel conducted a paltry investigation and were unaware of the vast amounts of significant mitigating evidence present in his background. Failures like those in Mr. Bond's case, where his counsel abjectly failed to investigate and present extant mitigating evidence, have been repeatedly addressed by this Court (i.e. in Williams, Wiggins and Rompilla). The Third Circuit Panel properly applied these precedents, and the Commonwealth makes no claim to the contrary.

IV. The Panel Correctly Held that the State Courts' Decisions Were Based on Unreasonable Factual Determinations in Light of the State Court Record.

The Commonwealth complains about two aspects of the Panel's ruling related to state court fact finding. First, it says the Panel did not give adequate deference to the state courts' finding that counsel prepared in advance. *Petition*, 10-13. Second, it says the Panel did not give adequate deference to the state courts' finding that the Commonwealth's expert "thoroughly refuted" the

testimony of Mr. Bond's expert witnesses. *Petition*, 13-17. In both instances, the state courts' findings were utterly unsupported by the record, and the Panel's findings were correct.

A. Counsel Did Not Prepare for Capital Sentencing.

The testimony of both Mr. Bruno and Mr. Owens was clear – there was no preparation for the capital penalty phase until the night between the delivery of the guilty verdict and the commencement of the penalty phase. Counsel failed to obtain anything approaching a social history of Mr. Bond. They failed to interview family members about his background. They failed to secure a single scrap of paper regarding his schooling or the head injury he suffered that required hospitalization for several days. The only relevant preparation was the hiring of Dr. Tepper. However, as the record shows without any question, counsel failed to provide Dr. Tepper with the information he requested and failed to follow up with him in any respect.

The Pennsylvania Supreme Court found that "lead trial counsel spoke on a number of occasions with appellant and his family, but that neither appellant nor his family members ever mentioned to counsel a history of abuse and family dysfunction. NT 4/15/97 at 62-63, 82-83." Bond-2, 45. The Court also found that counsels' investigation was not done on the eve of the penalty hearing – as Petitioner asserted – but before the start of the first homicide trial. Bond-2, 47 ("during the previous trial, lead counsel had spoken with family members with respect to information about appellant that might be helpful in mitigation"). These are unreasonable findings in view of the evidence presented to the state courts.

Trial counsel clearly testified about all of his contacts with the family. As outlined above, the only mitigation-related discussion occurred while the family was waiting for the verdict in the first homicide trial, lasted 15 minutes and took place in a group setting. Even then, the discussion

did not focus on Petitioner's background or on generating a social history that would have shed light on Petitioner's troubled life history – to the contrary:

> [T]he **big thought** at that time was he would have a lack of significant amount of convictions because he had no convictions at that time. So it was more of a – just to explain some of the things that Jesse had done where he would help people, that type of thing, to come under the catch-all phrase of any other factor that the jury would feel beneficial mitigation [sic].

A - 1582.

Counsel unequivocally testified that between the conviction in the first homicide and the start of the second, counsel failed to discuss mitigating evidence with the family. A - 1580-82; A - 1850-51.

The Pennsylvania Supreme Court cited Bruno's testimony at A - 1610-11 and 1629-30 to support its finding that counsel spoke with the family on a number of occasions yet none of them "ever mentioned a history of abuse and family dysfunction." Bond-2, 45. While these citations support the undisputed fact that Bruno spoke with the family, the Court ignored his additional testimony that the reason no one in the family told him about these topics is because he **never asked:**

> Q: [I]s it fair to say that you gave them [the family] an opportunity when you asked them is there anything that you can tell me about the defendant, about his background, his life or anything else that you think would be helpful to this case?
>
> A: Well, they certainly could have told me. It's not as if I had asked them about it though. I never really sat down and said, 'Tell me about his background.'

A - 1630.

The Pennsylvania Supreme Court also rejected Petitioner's failure-to-investigate claim because Bruno retained Tepper to evaluate Petitioner. Bond-2, 45. However, Wiggins v. Smith, 539 U.S. 510, 532 (2003), observed that the mere act of hiring a mental health evaluator "sheds no light

on the extent of [counsels'] investigation into petitioner's social background."

Wiggins has particular relevance here in view of counsels' failure to investigate and develop a social history. Rather, without performing that predicate step, counsel simply turned Petitioner over to Tepper and did nothing else. Counsel provided Tepper with no collateral records or information. He did not provide Tepper with any "specific direction" regarding the mitigating evidence with which he was interested: "I figured he would be the expert, he would know what was needed" A -1592. He did not ask questions of the doctor regarding the psychological tests that were administered or their results (A - 1591-92). He did not believe that it was "important" to question Tepper about his apparently anomalous findings that Petitioner was of "average intelligence" yet he had to repeat third grade (A - 1594). Bruno "basically ask[ed] Dr. Tepper is there anything at all that you can find in my client that will help me in my defense at the trial or the penalty phase . . . . [and] basically relied on Dr. Tepper" for putting together his mitigation case (A - 1608-09).

The Pennsylvania Supreme Court's belief that counsel performed adequately because he hired Tepper was also based in part on its finding that Tepper's report "informed counsel that he found nothing in his examination and testing of appellant that would be helpful in terms of mitigating evidence" (Bond-2, 45). This statement is again an unreasonable finding of fact in light of the evidence presented to the state court. Tepper's report does not say that "he found nothing helpful in terms of mitigating evidence" – the face of the report simply does not say that (see Tepper, Exhibit 2 at state post-conviction hearing (A - 1304)). Rather, as Tepper testified in state post-conviction proceedings, he made a number of findings that were mitigating or potentially mitigating, but which required further exploration: "I had reported information that I thought was accurate that suggested past family difficulties" (A -1680). Tepper found that Bond had in fact had

past difficulties in school (A - 1676). Tepper believed as a result of his evaluation that Mr. Bond had an impaired ability to conform his conduct to the law (A - 1701).[10] This finding was based on his impaired verbal skills, his impulsive behavior and his proclivity to act out before considering the consequences of his actions (id.).

Wiggins' admonition that the mere act of hiring a mental health provider "sheds no light on the extent of [counsels'] investigation into petitioner's social background" could not be more true than in this case. Hiring Dr. Tepper was quite literally all counsel did before the eve of the penalty hearing. Counsel here did far less than the Wiggins lawyers, who this Court said terminated their mitigation investigation based on a "narrow set" of sources. Wiggins, 539 U.S. at 524 ("counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"). Had counsel in this case relied upon a "narrow set of sources" in this case, that would have been a marked improvement over their preparation.

The Commonwealth also says the Panel failed to accord deference to the state courts' finding that counsel began penalty phase preparation well-before the guilty verdict was returned on the death case. *Petition*, 12 ("How could the state court been so completely wrong about whether counsel prepared before trial?). Even assuming for argument's sake that the Panel got this fact completely wrong, that would only remove the shocking fact that counsel did the vast bulk of their penalty preparation on the eve of the hearing. **That would not challenge at all the fact that trial counsel still failed to investigate or uncover the mitigating evidence about Mr. Bond's life.**

B. The State Court's Finding that Gordon "Thoroughly Refuted" Mr. Bond's

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[10] As noted above, this would constitute a statutory mitigating circumstance in Pennsylvania. See 42 Pa. C.S. § 9711 (e)(3) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.").

Mental Health Experts was Also Unreasonable.

The Pennsylvania Supreme Court concluded that the Commonwealth's mental health expert, Dr. Gordon "discredited the testimony of **both** of [Petitioner's] experts." Bond-2, 47-8. This was an unreasonable finding in view of the evidence presented. Mr. Bond presented undisputed evidence regarding the psychological scars resulting from Petitioner's childhood abuse, trauma and neglect. Gordon only disputed Crown's brain damage finding. Gordon did not refute any of the other testimony offered by Crown about Petitioner's traumatic history, and made no reference whatsoever to any of Dudley's conclusions. Indeed, Gordon agreed that the records that would have been available if counsel had properly investigated raised serious questions about family dysfunction during Mr. Bond's childhood. Thus, the Pennsylvania Supreme Court's reliance on Gordon to refute Petitioner's evidence of abuse and its mental health impact, was unreasonable – there were no facts to support this finding.

The Commonwealth ignores the absence of facts to support its attack on the Third Circuit Panel's decision. It says instead that the state courts conducted a lengthy evidentiary hearing before making this ersatz finding. *Petition*, 14. Of course, the fact that a hearing was held does not mean that the state courts' findings – regardless of how unreasonable and unsupported they are by the record – are to be credited. To be sure, AEDPA requires that they be accorded deference, but deference ends when findings are made of whole cloth.[11] See Miller-El v. Cockrell, 537 U.S. 322,

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[11]Some ten years after the trial judge, the Hon. David Savitt, presided over Mr. Bond's state post-conviction proceedings, the Pennsylvania Supreme Court was highly critical of his handling of another capital post-conviction petition. Commonwealth v. Beasley, 967 A.2d 376, 395 (Pa. 2009) ("we are dismayed at the exceptionally poor quality of the treatment of the present post-conviction petition . . . the reasons given by the PCRA court for rejecting the one claim the court addressed are badly out of sync with governing law and rational review . . . we cannot accept superficial reasoning and wholesale omissions . . .").

340 (2003) ("[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review").

V. The Commonwealth's Complaint Regarding the Panel's Finding that the State Courts' Ruling that the "Original Mitigation Case was Adequate" Flies in the Face of this Court's Capital Jurisprudence.

Dismissively referring to it as "an upgraded mitigation case," the Commonwealth takes issue with the Panel's finding that counsel performed deficiently when they failed to present evidence of Mr. Bond's troubled childhood, including childhood abuse, family dysfunction, and extreme poverty. *Petition*, 17. But, this is not a serious complaint. In making this finding, the Panel applied long-standing precedent holding that counsel must conduct a thorough investigation before tactical decisions are to be deferred to. See Strickland, 466 U.S. at 690-91, Wiggins, 539 U.S. at 521.

The Commonwealth's suggestion that this was simply an "upgrade" also cuts against this Court's modern-era capital jurisprudence, which holds that facts such as childhood abuse, family dysfunction and deprivation are not relevant and important mitigating evidence. See e.g. Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.")

This was not a situation where, as the Commonwealth argues, counsel chose between two tactical options after conducting a thorough investigation, and Mr. Bond is engaging in after the fact, second guessing. Rather, this was, as the Panel correctly found, an example of an uninformed decision:

> The Pennsylvania Supreme Court also incorrectly concluded that Bond wishes to second-guess a reasonable strategy that backfired. It is difficult to call Bond's counsel's decisions "strategic" when they failed to seek rudimentary background information about Bond. Strategy is the result of planning informed by investigation, not guesswork. The record does not support the suggestion that Bond's counsel's

> investigation met prevailing professional standards. With the investigation predicate so deficient, we must reject any lack-of-deficiency determination even under the deferential AEDPA standard. This conclusion accords with decisions of the Supreme Court, see, e.g., Wiggins.

Bond, at 289.

The Commonwealth's complaints lack merit.

CONCLUSION

For all of the reasons stated above, this Court should not grant *certiorari*. The Third Circuit's review of Mr. Bond's ineffective-assistance-of-counsel claim was thorough, careful and correct. It accorded the deference required by AEDPA to all facets of the state courts' opinions. The Commonwealth has failed to show that certiorari should be granted because this case presents an important issue of federal law that requires this Court's resolution or intervention. Rather, the Commonwealth asks this Court to grant certiorari merely to correct alleged errors committed by the Third Circuit, when those errors do not even exist.

Respectfully submitted,

LEIGH SKIPPER
CHIEF FEDERAL DEFENDER

By:
MICHAEL WISEMAN
STUART LEV
ASSISTANT FEDERAL DEFENDERS
Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 545- West, The Curtis Center
Philadelphia, PA 19106
215-928-0520
Counsel for Respondent, Jesse Bond

Dated: Philadelphia, PA
July 7, 2009

Certificate of Service

I, Michael Wiseman, hereby certify that on this 7th day of July, 2009 I served a copy of the foregoing upon the following persons by United States Mail, first class, postage prepaid:

Ronald Eisenberg, Deputy District Attorney
Thomas Dolgenos, Chief Federal Litigation
Office of the Philadelphia District Attorney
3 South Penn Square
Philadelphia, Pennsylvania 19102

_____
Michael Wiseman

REPLY BRIEF

(2)

No. 08-1242

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In The
Supreme Court of the United States

JEFFREY A. BEARD, et al.
Petitioners

v.

JESSE BOND,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

RONALD EISENBERG
Deputy District Attorney
(counsel of record)
THOMAS W. DOLGENOS
Chief, Federal Litigation
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107
(215) 686-5700

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Reasons for Granting the Petition

Bond, like the court of appeals, pays no real deference to either the fact findings or the legal conclusions of the state courts.

Bond argues that review should be denied because the failure to apply deference under 28 U.S.C. § 2254(d) presents no unsettled question of law. He contends that petitioners inadvertently concede the point by suggesting that the case may be suitable for summary, *per curiam* reversal. Petitioners, says Bond, therefore seek merely "error correction."

If so, then this Court has been doing a lot of error correction in recent years, on exactly this subject. Since the 2002 Term, the Court has reversed federal appeals courts, for failing to apply deference under § 2254(d), at least *twenty times*. *Nine* of those cases, almost half, have been decided by summary, *per curiam* opinions.[1] These numbers

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[1] *Bell v. Cone*, 535 U.S. 685 (2002); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (*per curiam*); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Price v. Vincent*, 538 U.S. 634 (2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*); *Middleton v. McNeil*, 541 U.S. 433 (2004) (*per curiam*); *Yarborough v. Alvarado*, 541

(continued...)

do not even count the many additional cases in which the Court has summarily reversed and remanded for reconsideration under the proper deference standard.[2]

Compliance with the deferential standard of review, therefore, is clearly a fundamental imperative that does indeed warrant the Court's attention. Petitioners of course have no objection to full briefing and argument of this case. But, considering how many times the Court has already had to say the same thing, summary reversal is at least equally appropriate.

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[1](...continued)
U.S. 652 (2004); *Holland v. Jackson*, 542 U.S. 649 (2004) (*per curiam*); *Bell v. Cone*, 543 U.S. 447 (2005) (*per curiam*); *Brown v. Payton*, 544 U.S. 133 (2005); *Kane v. Garcia Espitia*, 546 U.S. 9 (2005) (*per curiam*); *Rice v. Collins*, 546 U.S. 333 (2006); *Carey v. Musladin*, 549 U.S. 70 (2006); *Schrirro v. Landrigan*, 550 U.S. 465 (2007); *Uttecht v. Brown*, 551 U.S. 1 (2007); *Wright v. Van Patten*, 552 U.S. 120 (2008) (*per curiam*); *Waddington v. Sarausad*, 129 S. Ct. 823 (2009); *Knowles v. Mirzayance*, 129 U.S. 1411 (2009).

[2]*See, e.g., Klauser v. Gray*, 537 U.S. 1041 (2002); *Walls v. Henderson*, 537 U.S. 1230 (2003); *McGrath v. Chia*, 538 U.S. 902 (2003); *Miller v. Rodriguez*, 549 U.S. 1163 (2007); *Schmidt v. Van Patten*, 549 U.S. 1163 (2007); *Knowles v. Mirzayance*, 549 U.S. 1199 (2007); *Patrick v. Smith*, 550 U.S. 915 (2007); *Stevens v. Beard*, 551 U.S. 1111 (2007); *Hudson v. Spisak*, 128 S. Ct. 373 (2007).

Certainly this case presents the kind of deference-defying decision that the Court has taken pains to correct, most recently at the end of last Term with *Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009). As in many of the cases this Court has reversed, the federal habeas court rejected both factual and legal conclusions by the state courts. First the circuit court overturned crucial findings about counsel's performance and the strength of the new mitigation evidence he allegedly should have discovered. Then, freed of these factual constraints, the court declared counsel ineffective at the penalty phase for presenting a positive portrait of the defendant instead of hunting for evidence of dysfunction, such as brain damage, to suggest that the defendant's violent behavior was inherent.

Bond defends these improper rulings by the court of appeals, but only by employing the same improper reasoning. He spends the largest portion of his response, *see* Brief in Opp. at 22-25, attempting to justify the circuit court's unequivocal, threshold conclusion – made in direct opposition to a specific finding by the state supreme court – that trial counsel did nothing to prepare a penalty phase defense until the night before.

As his argument proceeds, however, it becomes clear that what Bond really seems to mean is not

that counsel failed to prepare a defense, but that he failed to prepare the "right" *kind* of defense.

Bond acknowledges, for example, that counsel in fact retained a mitigation specialist before the first of Bond's three homicide/shooting trials, two months before the trial in this case. Brief in Opp. at 5. But counsel was nonetheless culpable, argues Bond, because he did not provide the expert with certain records that would have steered him to conclude that Bond's childhood was "dysfunctional."

Similarly, Bond recognizes that counsel interviewed family members about mitigation during that prior trial. Brief in Opp. at 2. But counsel was nevertheless incompetent, contends Bond, because he did not ask the family a particular set of leading questions, so as to elicit responses about beatings, poverty, drinking, and gambling.

With these allegations, Bond is in a much grayer area – which should have made it harder, not easier, to dismiss the state court ruling as unreasonable.

Bond attempts to remedy this problem simply by disregarding significant portions of the week-long post-conviction hearing record that was before the state courts. Counsel explained there that the expert he hired was not just a Ph.D. clinical psychologist, but a practicing attorney specializing

in criminal defense. Counsel had hired the same expert in the past, and had provided any additional records the expert required. In this case, though, after questioning Bond, interviewing his mother, and performing an array of psychological tests, the expert did not indicate the need for anything further. If he had, counsel would have supplied it. N.T. 4/15/97, 40-41, 43, 45, 60-62, 66-67, 90-93; 3rd Cir. App. 1587-88, 1590, 1592, 1607-09, 1613-14, 1637-40.[3]

In any case, the expert himself testified at the post-conviction hearing that, *even if* he had had the hospital and school records that Bond now says should have been provided to him, he would *still* have concluded that there was no mental status mitigation. Having now reviewed the records, he conceded, he could not testify that Bond had organic brain damage, or was suffering extreme emotional distress, or lacked the capacity to appreciate the criminality of his conduct or conform

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[3]Bond now attempts to minimize the expert's evaluation as "limited" and "brief." Brief in Opp. at 5. But the issue here is not ineffective assistance of expert, and there was no evidence that counsel in any way constrained the expert's efforts.

Bond also alleges that the expert's written report did not explicitly state that he found no helpful mitigation. Brief in Opp. at 24. Of course not. As counsel testified, the expert reported his negative overall assessment orally, not in writing. N.T. 4/15/97, 63, 88; 3rd Cir. App. 1610, 1635.

it to the law. N.T. 4/15/97, 183-85; 3rd Cir. App. 1730-32.

Bond leaves out comparable information concerning the family members. Bond reports (in bold typeface) counsel's testimony that he did not sit down and ask relatives about Bond's "background." Brief in Opp. at 4, 23. Not in those exact words, no. Bond neglects to mention counsel's follow-up statement, however, that what he *did* ask was "what life with Jesse was like." N.T. 4/15/97, 83-84; 3rd Cir. 1630-31.

That was surely a doorway wide enough to draw in all manner of "dysfunction" details; yet family members instead informed counsel that, before the crime spree that culminated in this capital murder conviction, Bond never really had any behavioral problems. They never suggested that Bond abused drugs or alcohol, that he displayed any mental difficulties, or in fact that he was unusual in any respect. N.T. 4/15/97, 63-64, 84-86; 3rd Cir. App. 1610-11, 1631-33.

Indeed even at the post-conviction hearing, where they were certainly aware of the new mitigation strategy being pursued by Bond's new lawyers, the relatives' testimony failed to support the notion that a difficult childhood explained Bond's sudden two-week rampage at age 25. To the contrary, family members admitted that they were completely "shocked" when Bond was arrested.

The shootings seemed totally out of character with his past behavior. In fact, he had never before been violent in any way. N.T. 4/15/97, 118-19, 258; 3rd Cir. 1665-66, 1805.

Thus on the actual record, the one on which the state courts ruled, it was hardly unreasonable to find that counsel did inquire about Bond's background. If counsel perceived Bond as a basically good kid gone briefly wrong, it was because he was advised, both by an experienced J.D./Ph.D. mitigation expert and by family members, that there were no mental health or behavioral problems in Bond's past. If, in contrast, Bond were really the innately homicidal product of lifelong organic and social dysfunction, as he now sees fit to portray himself, perhaps someone would have mentioned something about that even without specific prompting from counsel.

Bond, like the court of appeals, avoids this conclusion by reading the record in the light most favorable to himself, ignoring conflicting testimony, passing over evidence that does not favor his position, and highlighting or overstating the rest. But that, of course, is not the test under § 2254(d). On the proper standard, there is simply no defense for the circuit court's declaration that the state supreme court lacked *even a reasonable basis* for its ruling on counsel's preparation.

Even more indefensible was the circuit court's rejection of the credibility determinations made against defense experts. The state trial judge, after hearing the two experts who would supposedly prove that Bond's "social history" was the cause of various disabilities, discredited the experts' opinions. In response now, Bond has not much to say, but essentially adopts the circuit court's two-against-one theory: the state presented a brain damage expert, but he only negated the defense brain damage expert, leaving the remaining defense expert unscathed; so the state judge could not reasonably disbelieve both defense witnesses.

Such a syllogism would be silly even under a normal standard of review, let alone under AEDPA deference. Appellate courts do not get to micro-manage trial court assessments of expert opinion by counting up the number of witnesses. And the circuit court's credibility veto in this case was even more inappropriate in light of the state judge's written findings about the second expert, Dr. Dudley. The judge made clear that he rejected Dudley's diagnoses on *two* grounds: not only because they were debunked by the state's expert, App. 149, but *also* because Dudley failed to convince him that they were true *as of the time of the crime*, App. 150. *See* Cert. Pet. at 14-15. This second finding by the state judge, on top of the first, should have constrained the habeas court. Yet neither Bond nor the court of appeals ever even mention it.

Nor does Bond or the circuit court ever grapple with the import of these expert witness findings as to the *lay* witnesses. Without the discredited expert opinions, the testimony of Bond's family members – that he was poor, that his mother was bad, that he missed school, that he was hit on the head – was simply incapable of establishing a "dramatically upgraded" mitigation case.[4] Without the discredited diagnoses, there was no causation – no link between Bond's childhood experiences, which are hardly unique, and the three people he shot in cold blood. Without the debunked defense experts, there was no way to distinguish Bond from the millions of other children from bad neighborhoods who do not grow up to be double murderers. There was no way to distinguish him even from his own five siblings, who grew up in the same household.

In the end, however, worse than the circuit court's failure to give factual deference was its refusal to respect the state courts' legal conclusions. The state courts ruled that counsel's actual mitigation strategy – to show that Bond's criminal conduct was aberrational – was within the bounds of effective representation. The court of appeals held, in contrast, that counsel should

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[4]Bond insinuates that the "upgrade" language is petitioners'. Brief in Opp. at 27. In fact the words come directly from the court of appeals opinion. App. 89.

instead have pursued a dysfunction defense, and that the state courts did not have even a reasonable basis for concluding otherwise. That holding by the habeas court was a violation of AEDPA/*Strickland*[5] deference, even aside from the court's improper redeterminations of fact.

The basis for the circuit court's dismissal of the state ruling, echoed now by Bond, is the line of this Court's cases culminating in *Rompilla v. Beard*.[6] Bond and the circuit court treat *Rompilla* as if it establishes in essence an automatic investigation rule. Buried in the Sixth Amendment is supposedly a checklist of conduct that all capital counsel must follow, most especially including efforts to develop evidence that the defendant had a dysfunctional childhood and psychological impairments that caused his criminal behavior. If, as here, relatives and experts belie the existence of such evidence, counsel has a duty to press on anyway.

This is an increasingly common conception of *Rompilla* in the lower courts; but it is wrong; and it should be corrected. To be sure, the defendant in *Rompilla*, represented by the same lawyers as is

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[5] *Strickland v. Washington*, 464 U.S. 668 (1984).

[6] *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

Bond here, argued that capital defense counsel have an inherent duty to explore school, hospital, and other records, even if family members have suggested little reason to believe such investigation will be useful.

But the *Rompilla* Court *explicitly declined* to adopt the defendant's checklist approach, 545 U.S. at 383, and *specifically denied* the charge of the dissent that it was doing so, *id.* at 389; *see id.* at 399-400, 402-04 (Kennedy, J., dissenting). Indeed the Court discounted the notion that capital counsel must routinely be "[q]uestioning a few more family members and searching for old records." *Id.* at 389. The actual reason for finding ineffective assistance in *Rompilla* was not because counsel failed to cast a wider net for more mitigation evidence, but because counsel failed to focus on specific *aggravation* evidence that he already knew the prosecution would be introducing. *Id.* at 377, 383, 385, 389.

Nor can *Rompilla* support the idea that a capital defendant is necessarily prejudiced when his lawyer presents an aberration defense at the penalty phase in place of a dysfunction defense. The problem in Rompilla's case was that he did not *have* an aberration defense. Unlike Bond, he sorely lacked a pristine prior record; indeed, he had already committed a serious burglary/assault that closely paralleled the murder for which he was on trial. And his family could not credibly testify to

his good traits, because he had spent so many years in jail for various offenses that they barely felt they knew him. 545 U.S. at 382, 383, 386; *id.* at 394 (O'Connor, J., concurring.)

By contrast, Bond was a reasonably solid citizen who, despite gang harassment, limited education, and abandonment by his father, managed to work, take care of his relatives, and stay out of trouble until a confluence of misfortunes pushed him into a brief spasm of violent acts. An attempt to supplement this evidence -- by claiming that Bond was brain damaged and incapable of controlling himself – would have been both dumbfounding and dangerous: Where was his brain for the first 25 years of his life? And if he is really that impaired, what is to stop him from doing it again?

The court of appeals insisted that there was no such trade-off, App. 88, but that is facile. The whole point of an organic-brain-damage, post-traumatic-stress-disorder, alcoholic-abusive-mother defense is that the defendant is less culpable for his conduct because he cannot help it; the failure to appreciate or inhibit anti-social behavior is, through no moral failing of his own, characteristic. The whole point of an aberration defense, on the other hand, is that the defendant has led a more virtuous life in the past, and can again in the future; the criminal interlude is uncharacteristic. These two approaches cannot easily coexist.

But even if they could, the court of appeals would still have had no business overturning the state judgment. The federal court held that counsel was constitutionally obligated to develop an alternative defense, and accept its risks, not because he otherwise lacked a viable strategy, but simply because he could improve his options. A checklist investigation is required, in other words, just in case. There was nothing to lose, and an "upgraded" mitigation case to gain.

That is why the Court's recent decision in *Knowles v. Mirzayance* is of particular significance. Bond maintains that *Knowles* did not really break new ground. But that is exactly the point. There have indeed been many prior cases attempting to conform federal habeas rulings to current law. Some of these decisions have involved circumstances much like those here.[7] *Knowles* makes clear, however, in regard to both fact findings and legal conclusions, and as a matter of both AEDPA and *Strickland* deference, that the problem remains acute. The ruling below should

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[7] *See, e.g., Woodford v. Visciotti*, 537 U.S. 19, 26 (2002) (*per curiam*) (summarily reversing federal court of appeals ruling that state habeas petitioner's counsel was ineffective for failing "to introduce mitigating evidence about [petitioner]'s background, including expert testimony that could have been presented about his growing up in a dysfunctional family in which he suffered continual psychological abuse").

no more be permitted to stand than those in the Court's other recent deference decisions.

Conclusion

For these reasons, petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
(counsel of record)
THOMAS W. DOLGENOS
Chief, Federal Litigation
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107
(215) 686-5700